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the question of proving contributory negligence. Although there is much conflict of authority, the decision in the instant case seems contrary to previous Texas decisions and to the better rule.

**EVIDENCE—PROVINCE OF THE COURT—QUESTIONS BY A JUDGE TO A WITNESS.**—The defendant was convicted of rape. He appealed and assigned as one ground of error that the court undertook the examination of one of the witnesses and thereby prejudiced the jury. *Held*, that the examination by the judge was error. *State v. Sandquist* (1920, Minn.) 178 N. W. 883.

The general rule of the orthodox common law, and of the majority of jurisdictions in the United States, is that the judge has not only the power to examine witnesses, but that he is under a duty to do so when it appears that the witness is evasive, diffident, or ignorant. He may even call new witnesses of his own volition, if he feels that the whole truth has not been disclosed. In so acting, however, he must so frame his questions that he gives no impression of partiality to the jury. *Adler v. United States* (1910, C. C. A. 5th) 182 Fed. 464; *Dutton v. Territory* (1910) 13 Ariz. 7, 108 Pac. 224; 1 Wigmore, *Evidence* (1904) sec. 784. The same rule applies to civil as well as to criminal cases. *Eekhout v. Cole* (1904) 135 N. C. 583, 47 S. E. 655. In the instant case, the court would limit the judge to questions in only rare and unusual instances. It is submitted that the correct decision was reached, since there was an indication of partiality on the part of the judge, but as a general rule the judge should have wider powers than the language of the court suggests.

**INSURANCE—MARINE INSURER LIABLE FOR UNREPAIRED DAMAGE ALTHOUGH SHIP WAS LATER TOTALLY LOST THROUGH AN EXCEPTED PERIL.**—The plaintiff's steamship *Eastlands* was insured by the defendant under a time policy against perils of the seas only, including particular average. She had been requisitioned by the Admiralty and was under a charter-party to the government, which undertook to pay the value of the ship, at the time she was lost, if a loss was occasioned by war risks. During the currency of the policy, she was damaged by perils of the seas, only part of which damage had been repaired when she was torpedoed and became a total loss. In an action on the policy, the issue was as to the liability of the defendant for the unrepaired damage. *Held* in the Court of Appeal, that the defendant was liable. *Wilson Shipping Co. Ltd. v. British & Foreign Marine Ins. Co.* [1920] 2 K. B. 25.

The defendant's argument, adopted in the King's Bench Division, was that it was not liable because the partial loss was merged in the total loss from an excepted peril. In 1810 Lord Ellenborough formulated the rule that "where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim against the underwriters." *Livie v. Janson* (1810) 12 East, 648, 654. It was unsuccessfully attempted to interpret this rule as meaning that an insurer is not liable for unrepaired damages in any case where the subject-matter is later wholly lost by an excepted peril before termination of the risk. *Knight v. Faith* (1850) 15 Q. B. 649; *Pitman v. Universal Marine Ins. Co.* (1882) L. R. 9 Q. B. 192; but see 17 Halsbury, *Laws of England*, 469; 5 Joyce, *Insurance* (2nd. ed. 1918) sec. 3016; 2 Arnould, *Marine Insurance* (9th ed. 1914) 1290. In an early dictum this interpretation was recognized as the law in America. See *Rice v. Homer* (1815) 12 Mass. 229, 234. The holding in the instant case properly emphasizes that a defense on the grounds of merger of damages will be sustained only where the insured is ultimately not prejudiced by the prior partial loss. It should be termed a doctrine of merger of damages, not merger of losses, because its basis is want of damnification. The reason for the rule is that insurance is essentially a contract of indemnity and is not a contract for the payment of a sum of money on the happening of a certain event.